88-1280

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS,
a non-profit corporation,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, AND NICHOLAS DE BENEDICTIS, SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL RESOURCES OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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51pp

Questions Presented

The Pennsylvania Oil and Gas Act gives broad enforcement powers to the Department of Environmental Resources; and expressly makes violation of any of its provisions a crime. The Act creates a presumption that a well operator is the cause of any water pollution within 1,000 feet of a well site; and compels the operator to restore the polluted water supply unless he can affirmatively prove he is not the cause. Failure to restore the water supply is a crime. The Act also authorizes Department agents to conduct warrantless searches of any property where drilling operations are conducted or where records are kept; and compels production of documents "pertinent to any matter under investigation". Failure to admit Department agents conducting such searches or to produce requested documents is a crime.

The questions presented are:

1. Whether the ability to hold a well operator criminally liable for failing to restore a polluted water supply without first having to prove that the operator is the cause of the pollution violates the well operator's right to due process?

2. Whether the choice given a well operator of committing a criminal violation of the Oil and Gas Act or of acquiescing to a warrantless search of his premises or to the compelled production of documents that may be used to convict him of a crime violate rights secured by the Fourth and Fifth Amendments, as made binding on the States by the Fourteenth Amendment?

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IN THE

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October Term, 1988

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS, a non-profit corporation,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, AND NICHOLAS DE BENEDICTIS, SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL RESOURCES OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner Pennsylvania Independent Petroleum Producers respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled proceeding on November 14, 1988.

Opinions Below

The *per curiam* Order of the Supreme Court of Pennsylvania dated November 14, 1988, has not been reported and is set forth in the appendix hereto, p. 1a, *infra*.

The opinion of the Commonwealth Court of Pennsylvania granting summary judgment in favor of Respondents is reported at 106 Pa. Commw. Ct. 72, 525 A.2d 829 (1987) and is set forth in the appendix hereto, p. 3a, *infra*.

The opinion of the Commonwealth Court of Pennsylvania overruling Respondents' preliminary objections is reported at 95 Pa. Commw. Ct. 51, 504 A.2d 420 (1986) and is set forth in the appendix hereto, p. 19a, *infra*.

Jurisdiction

Petitioner commenced this action in the Commonwealth Court of Pennsylvania contending that the Pennsylvania Oil and Gas Act of 1984 deprived its members of rights secured by the Fourth and Fifth Amendments to the United States Constitution as made binding upon the States by the Fourteenth Amendment to the United States Constitution. The Commonwealth Court entered judgment in favor of Respondents on May 11, 1987.

On Petitioner's appeal, the Supreme Court of Pennsylvania in an Order dated November 14, 1988, affirmed the grant of summary judgment in favor of Respondents.

The jurisdiction of this Court to review the judgment of the Supreme Court of Pennsylvania is invoked under 28 U.S.C. §1257(a).

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment XIV:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law...."

The Pennsylvania Oil and Gas Act of 1984, Act of December 19, 1984, P.L. 1140, No. 223, §101, *et seq.*, 58 P.S. §601.101, *et seq.* The following Sections of that Act are reproduced in full in the appendix hereto commencing at p. 23a, *infra*, and are not set forth at this point because of their length: §§201, 208, 212, 505, 508 and 509.

Statement of the Case

Petitioner, Pennsylvania Independent Petroleum Producers, is a non-profit corporation headquartered in Oil City, Pennsylvania. Its more than 500 members are individuals and small companies who explore for and produce small quantities of high quality "Pennsylvania crude" oil from shallow stripper wells in Northwestern Pennsylvania and Southwestern New York. They operate in much the same manner, and on the same small scale, as Colonel Drake and those pioneers who founded the petroleum industry more than a century ago. Most of Petitioner's members operate fewer than ten wells and work out of, and keep all drilling records in, their homes.

The Oil and Gas Act of 1984 was signed into law by Governor Richard Thornburgh on December 19, 1984, effective April 18, 1985. Petitioner's members, all of whom were engaged in producing oil from shallow stripper wells prior to the enactment of the Oil and Gas Act, testified at the injunction hearing that they have been unable to legally operate their existing wells or to drill new wells because of the restrictions on drilling for and producing oil contained in the Act and because of the criminal sanctions the Act mandates for even minor transgressions.

In May of 1985, Petitioner commenced the instant litigation by filing a Petition for Review In The Nature Of An Equitable Action For Declaratory Judgment in the Commonwealth Court of Pennsylvania, at No. 1195 C.D. 1985. In that Petition, it is averred that the Oil and Gas Act violates numerous rights secured by the United States Constitution.

First Count of the Petition avers that Section 208 of the Act deprives Petitioner's members of due process of law by creating a presumption that well operators are

the cause of water pollution occurring within 1,000 feet of a drilling site; and enables the Commonwealth to hold the well operator criminally responsible for failing to remedy such pollution without having to prove that the well operator has caused the pollution. Fifth Count of the Petition avers that Section 508 of the Act violates the Fourth Amendment in that it enables the Department of Environmental Resources to make random, warrantless searches of drilling sites and sites where drilling records are kept, including the homes of Petitioner's members. Sixth Count of the Petition avers that the provisions of the Act compelling the compiling of records and documents and the duty to produce such documents to buttress ongoing criminal investigations is violative of the privilege against self-incrimination protected by the Fifth Amendment. Those contentions have been asserted at every stage of the proceedings in this case, and have been rejected by the Commonwealth Court and by the Supreme Court of Pennsylvania.

At the same time the Petition for Review in the Nature of an Equitable Action for Declaratory Judgment was filed, Petitioner filed a Motion for Preliminary Injunction seeking to prevent Respondents from enforcing the Oil and Gas Act. A hearing on that motion was conducted in July of 1985; and the motion was denied by Senior Judge Wilson Bucher in an Order dated September 4, 1985.

Respondent then filed Preliminary Objections in the nature of a demurrer, averring that the complaint [*i.e.* the Petition] failed to state a claim upon which relief can be granted and that the action was not ripe. In an opinion and order dated February 7, 1986, the *en banc* Commonwealth Court overruled Respondents' preliminary objections and held that:

> "The complaint presents several justiciable issues concerning the validity of certain provisions of the Act, the impact of which presents sufficient direct and immediate injury for this Court to entertain jurisdiction at this time." Appendix pp. 21a-22a.

Discovery was completed; and Petitioner filed a Motion for Summary Judgment, which was again argued before the Commonwealth Court *en banc*. In an opinion and order filed on May 11, 1987, that Court denied Petitioner's motion for summary judgment and entered summary judgment in favor of Respondents. Appendix p. 3a.

A direct appeal of the grant of summary judgment in favor of Respondents was taken to the Supreme Court of Pennsylvania. In a *per curiam* Order dated November 14, 1988, the Supreme Court affirmed the grant of summary judgment. Mr. Justice Larsen dissented from that Order. Appendix p. 1a.

Petitioner now respectfully requests that your Honorable Court grant certiorari to determine whether the actions sanctioned by the Oil and Gas Act, which fly in the face of protections mandated by your Honorable Court in purely criminal cases, are proper when placed in a statute intended to protect the environment even though that statute imposes severe criminal sanctions upon those who violate any of its provisions.

REASONS FOR GRANTING WRIT

I. The Pennsylvania Legislature and Courts have done violence to the mandate that no person can be convicted of a crime unless the State proves every fact necessary to establish his guilt by creating a presumption that a well operator is the cause of water pollution occurring within 1,000 feet of a well site; and making it a crime for the operator to fail to restore the polluted water supply. Thus, the well operator may be criminally sanctioned for failing to restore polluted water supplies even though there is no evidence that the well operator has caused the water pollution.

It is clear that a person cannot be convicted of a crime unless the State proves every fact necessary to establish his guilt beyond a reasonable doubt. This protection is "basic in our law and rightly one of the boasts of a free society. . . ." *In Re Winship*, 397 U.S. 358, at p. 362 (1970). And, the State's duty to prove all facts necessary to establish guilt cannot be circumvented by the creation of a presumption which, even though not conclusive, has "the effect of shifting the burden of persuasion to the defendant. . . ." *Sandstrom v. Montana*, 441 U.S. 510, at p. 524 (1979).

The Oil and Gas Act, by clothing criminal penalties in environmental garb, permits the State to criminally convict a well operator for failing to restore polluted waters without first having to prove that the well operator is the cause of that pollution. And that assault on the due process protection described by your Honorable Court as "basic in our law" has been sanctioned by the highest Court of the Commonwealth of Pennsylvania. It is respectfully contended that it should be made clear whether the protections established in *Winship* and *Sandstrom*, *supra*, for those accused of

violating purely criminal laws, apply with equal vigor to those accused of violating environmental laws and who, if found culpable, will be subject to fines and imprisonment.

Section 208(a) of the Oil and Gas Act requires any well operator who pollutes or diminishes a water supply to restore or replace the affected waters; and Section 208(c) provides that:

> "Unless rebutted . . . it shall be presumed that a well operator is responsible for pollution of a water supply that is within 1,000 feet of the oil and gas well. . . ." Act of December 19, 1984, P.L. 1140, No. 223, §208, 58 P.S. §601.208(a) and (c).

Thus, failure of a well owner to restore or replace any polluted or diminished water supply occurring within 1,000 feet of any of his wells constitutes a violation of the Act; and, failure to comply with an Order of the D.E.R. to restore such waters constitutes a wilful violation of the Act. Section 508 of the Oil and Gas Act makes violation of "any provisions of the act" a summary offense punishable by a fine of up to $300 and imprisonment of up to 90 days; and makes a wilful violation of "any provisions of this act or any order of the department issued pursuant to the provisions of this act" a misdemeanor punishable by a fine of up to $5,000 and imprisonment of up to one year. Moreover, each day the violation continues constitutes a separate and distinct offense. Act of December 19, 1984, P.L. 1140, No. 223, §505, 58 P.S. §601.505(a) and (b).

A well operator whose well is situated within 1,000 feet of a polluted water supply can avoid those criminal sanctions *only if he can:*

> "*. . . affirmatively prove one of the following five defenses:*

(1) The pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey.

(2) The landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey.

(3) The water supply is not within 1,000 feet of the well.

(4) The pollution occurred more than six months after completion of drilling or alteration activities.

(5) The pollution occurred as the result of some cause other than the drilling or alteration activity."

Act of December 19, 1984, P.L. 1140, No. 223, §208, 58 P.S. §601.208(d)

Because the shallow wells indigenous to the area are drilled closely together; and because they are constantly being altered to maximize output; this Act places on well operators the responsibility of affirmatively proving the cause of virtually every instance of water pollution that might occur within the several thousand square miles that constitute the Northwestern Pennsylvania and Southwestern New York oil field if they are to avoid either the tremendous cost that restoration of such water supplies would entail or criminal liability that, because each day the pollution continues constitutes a separate offense, could divest them of all their belongings and permanently deprive them of their freedom. And, such sanctions can be imposed even in the absence of a scintilla of proof that those subject to such fines and terms of imprisonment have polluted or diminished any waters whatsoever.

Petitioner's members testified in the injunction hearing that the threat of such sanctions has inhibited them from producing oil from existing wells; and has prevented them from obtaining the bonds required to drill new wells since bonding institutions are unwilling to commit funds to activities where violations have such draconian effects and are so easily proved. They now urge your Honorable Court to determine whether those due process consideration that must be afforded to persons accused of committing the most heinous of crimes must also be applied to protect those whose "crime" is trying to eek a modest living out of the forested hills and valleys of Northwestern Pennsylvania and Southwestern New York State.

II. The Oil and Gas Act authorizes the State to make unlawful warrantless searches of the property of well operators; and compels well operators to produce information the State requires them to compile to enable the State to prove that the well operator has committed criminal acts. A well operator can avoid such unlawful searches and the duty to produce potentially incriminating evidence only by refusing to comply with the State's request; and such refusal is made a crime. Thus, the Act prevents oil and gas producers from asserting constitutionally protected rights unless they are willing to commit a criminal offense.

It is clear a State cannot authorize its officials to make random, warrantless searches of business premises even if it is a legitimate exercise of the State's police power to regulate the activities conducted on those premises. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); and *Donovan v. Dewey*, 452 U.S. 594 (1981). The Oil and Gas Act permits the D.E.R. to make such warrantless searches. Thus, §508(a) specifically provides that:

> "The department is authorized to make such inspections, conduct such tests or sampling or examine books, papers and records *pertinent to any matter under investigation* pursuant to this act as it deems necessary to determine compliance with this act *and, for this purpose, the duly authorized agents and employees of the department are authorized at all reasonable times to enter and examine any property, facility, operation or activity.*" Act of December 18, 1984, P.L. 1140, No. 223, §508, 58 P.S. §601.508(a).

The identical language in the Solid Waste Management Act has been construed by the Supreme Court of Pennsylvania as authorizing unlawful warrantless searches. *Commonwealth v. Lutz*, 512 Pa. 192, 516 A.2d

339 (1986), vacated on other grounds in _____ U.S. _____, 107 S.Ct. 1560 (1987). And, employees of the D.E.R. charged with enforcing the Oil and Gas Act are given unbridled discretion in determining whether, and when, to conduct the warrantless searches authorized by the Oil and Gas Act. See the deposition of Mr. James E. Erb, Director of the Bureau of Oil and Gas Management of the Department of Environmental Resources, who testified under oath that its investigations are random and left to the discretion of its field agents; and that the fruits of such investigations have been used in criminal prosecutions. (Erb Deposition at pp. 70, 75 and 80).

Nevertheless, the warrantless search provisions of the Oil and Gas Act were not deemed violative of the Fourth Amendment because the Act provides that if a well operator refuses to admit a D.E.R. agent desirous of conducting a warrantless search:

> "... [T]he agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection. It shall be sufficient probable cause to issue a search warrant authorizing such examination and inspection if there is probable cause to believe that the object of the investigation is subject to regulation under this act...." Act of December 19, 1984, P.L. 1140, No. 223, §508, 58 P.S. §601.508(b).

However, the Oil and Gas Act makes clear that in order to compel the D.E.R. agent to obtain such a warrant, the well operator must first violate the Act and subject himself to criminal sanctions. Thus, the well operator confronted by a D.E.R. agent desiring to make a warrantless search of his premises and business records is faced with the "Hobson's choice" of acquiescing to the unlawful search, or of committing a criminal offense that could subject him to imprisonment

for as long as a year and to a fine of as much as $5,000 for each day he refuses to acquiesce to the agent's demands.

That refusing to admit the D.E.R. agent seeking to make a warrantless search constitutes a criminal offense is clear. The Act gives no discretion to the well operator. Section 508 of the Act states flatly that:

> "*The owner,* operator or other person in charge of such property ... *shall give such agents and employees free and unrestricted entry and access....*" 58 P.S. §601.508(b)

Moreover, §509 makes clear that it shall be unlawful to refuse entry to a D.E.R. agent seeking to make the warrantless search. That section provides that:

> "*It shall be unlawful for any person to ....*
>
> (3) *Refuse ... any agent or employee of the department ... entry and inspection under any circumstances....*"
>
> Act of December 19, 1984, P.L. 1140, No. 223, §509, 58 P.S. §601.509.

And, "any person who wilfully violates any provision[s] of this act" commits a misdemeanor, punishable by imprisonment of up to one year and a fine of up to $5,000. Act of December 19, 1984, P.L. 1140, No. 223, §505, 58 P.S. §601.505(b).

Similarly, the Oil and Gas Act compels well operators to compile extensive records; and then mandates that the well operator turn over those records to facilitate D.E.R. investigations. See §212, 58 P.S. §601.212; and §508, 58 P.S. §601.508. Thus, it is evident that the Act deprives well operators of the privilege against self-incrimination. See *Boyd v. United States,* 116 U.S. 616 (1896), making clear that the government cannot compel an accused to produce the very evidence that will be used to convict

him of a crime. While that prohibition has been relaxed to permit the surge of legitimate governmental regulation made necessary during the past century, production of potentially incriminating documents is still subject to the privilege against self-incrimination when the documents sought are those the government compels the accused to compile and are to be used in a particular criminal investigation and are not simply documents which are compelled to be routinely submitted by all subject to the regulatory authority. See *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); and *United States v. John Doe,* 465 U.S. 605 (1984). And, that is precisely the manner in which §508 of the Oil and Gas Act permits the documents the well operator must compile to be used.

By making it a criminal act for a well operator to refuse to turn over records, including those the State requires him to compile, to assist the State in proving a criminal violation of the Oil and Gas Act it is then investigating, the Oil and Gas Act deprives well operators of the right to assert that their privilege against self-incrimination is being violated unless they wilfully violate the Act and risk being criminally sanctioned for that violation.

In sum, the Pennsylvania Oil and Gas Act effectively neutralizes protections afforded by the Fourth and Fifth Amendments to the United States Constitution, and made binding upon the States by the Fourteenth Amendment, by making it a crime to refuse to grant entry to D.E.R. agents desirous of making the unlawful searches; or to produce those documents that may violate the privilege against self-incrimination. And, the Courts of the Commonwealth of Pennsylvania have sanctioned such an "end run" around the constitutional protections.

Conclusion

The legislature of the Commonwealth of Pennsylvania, in its zeal to protect the State's environment, has enacted legislation that enables the State to convict oil well operators for failing to restore polluted water supplies without first having to prove that the well operator is the cause of the pollution; and which forces well operators to make the Hobson's choice of either submitting to the warrantless search of their homes and properties and of producing the very evidence that may be used to convict them of a crime in a pending investigation, or of committing a separate and distinct offense by refusing the State permission to make such searches. And, those practices have been sanctioned by both the Commonwealth and Supreme Courts of Pennsylvania.

Petitioner respectfully urges your Honorable Court to grant certiorari to review the decisions of the Pennsylvania courts which suggest that the protections inherent in the Fourth and Fifth Amendments which prevent law enforcement authorities from using such tactics to snare street criminals have no force when the offensive provisions are cloaked in environmental garb and enforced by agents of the Department of Environmental Resources.

Respectfully submitted,

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APPENDIX

Order of Supreme Court of Pennsylvania Dated November 14, 1988

[J-192 of 1988]

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 51 W. D. Appeal Dkt. 1987

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS, a non-profit corporation,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, and NICHOLAS DeBENEDICTIS, Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania.

APPEAL FROM ORDER OF COMMONWEALTH COURT
ENTERED MAY 11, 1987, AT NO. 1195 C.D. 1985

_____ Pa.Commw. _____, _____
A.2d _____ (1987)

Argued: October 25, 1988

ORDER

PER CURIAM: FILED: NOVEMBER 14, 1988

Order affirmed.

Mr. Justice Flaherty did not participate in the consideration or decision of this case.

Mr. Justice Larsen dissents.

JUDGMENT ENTERED THIS 14th DAY OF NOVEMBER, 1988.

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

[72] **Opinion of the Commonwealth Court Dated May 11, 1987, Entering Summary Judgment in Favor of Respondents**

PA. IND. PET. PRODUCERS *v.* PennDER.

[72] 525 A.2d 829

Pennsylvania Independent Petroleum Producers, A Non-Profit Corporation, Petitioner *v.* Commonwealth of Pennsylvania, Department of Environmental Resources and Nicholas De Benedictis, Secretary of Environmental Resources of the Commonwealth of Pennsylvania, Respondents.

Declaratory judgment—Summary judgment—Oil and Gas Act, Act of December 19, 1984, P.L. 1140—Bond—Wells—Equal protection—Due process—Burden of proof—Reports—Delegation of legislative power—Environmental Hearing Board—Environmental Quality Board—Department of Environmental Resources—The Administrative Code of 1929, Act of April 9, 1929, P.L. 177.

1. The issuance of a declaratory judgment is a matter of judicial discretion which should be exercised only to illuminate an existing right, status or legal relation; an actual controversy must exist for declaratory relief to be appropriate. [75]

[73] 2. Summary judgment may be entered only when the case is clear and free from doubt and the moving party proves that there is no genuine issue of material fact to be tried and that it is entitled to judgment as a matter of law; the record must be viewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. [75]

3. A motion for summary judgment is appropriate in declaratory judgment proceedings. [75]

4. Section 215(a) of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, requiring the filing of a bond with the Department of Environmental Resources upon the filing of an application for a well permit or before continued operation of any oil or gas well, is reasonable and non-discriminatory against small operators and, therefore, does not violate equal protection safeguards. [77]

5. A statute's constitutionality against a due process challenge is presumed unless there appears a clear and palpable constitutional violation. [80]

6. The strong presumption of the constitutionality of a statute survives unless a party meets its heavy burden of showing that the statute clearly, palpably and plainly violates the Constitution. [82]

7. The requirement of Section 212 of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, that well operators file reports specifying the status and production level of each well does not infringe upon any constitutional right of a well operator. [82-3]

8. The standards in the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, are definite and reasonable and constitute a lawful delegation of legislative power to the Environmental Quality Board. [83-4]

9. The Oil and Gas Act, Act of December 19, 1984, P.L. 1140, and The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, violate no constitutional rights of well operators in the distribution of functions among the

Environmental Hearing Board, the Environmental Quality Board and the Department of Environmental Resources. [85-6]

Judge BARRY concurred in the result only.

Argued November 19, 1986, before President Judge CRUMLISH, JR., and Judges CRAIG, MACPHAIL, DOYLE, BARRY, COLINS and PALLADINO.

[74] Original Jurisdiction, No. 1195 C.D. 1985, in the case of Pennsylvania Independent Petroleum Producers, A Non-Profit Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources and Nicholas De Benedictis, Secretary of Environmental Resources of the Commonwealth of Pennsylvania. Petition for review in the Commonwealth Court of Pennsylvania in the nature of an action for declaratory judgment. Petitioner moved for preliminary injunction. Respondents filed preliminary objections in the nature of a demurrer. Preliminary injunction denied. Preliminary objections overruled. Petitioner filed motion for summary judgment. Held: Motion denied. Judgment entered for respondents.

Thomas L. Cooper, with him, *Alfred S. Pelaez, Gilardi, Cooper & Gismondi, P.A.,* for petitioner.

Jerome T. Foerster, Deputy Attorney General, with him, *Justina Wasicek,* Assistant Counsel, *Andrew S. Gordon,* Chief Deputy Attorney General, for respondents.

OPINION BY PRESIDENT JUDGE CRUMLISH, JR., May 11, 1987:

The Pennsylvania Independent Petroleum Producers[1] (PIPP) filed a petition for review in the nature of an equitable action for declaratory judgment challenging the constitutionality of the 1984 Oil and Gas Act.[2] The Commonwealth filed preliminary objections, which were denied *per curiam*. *Pennsylvania Independent Pe-* [75] *troleum Producers v. Department of Environmental Resources,* 95 Pa. Commonwealth Ct. 51, 504 A.2d 420 (1986). PIPP has now filed a motion for summary judgment. We deny said motion.

The issuance of a declaratory judgment is a matter of judicial discretion which should only be exercised to illuminate an existing right, status or legal relation. *Doe v. Johns-Manville Corp.,* 324 Pa. Superior Ct. 469, 471 A.2d 1252 (1984). An actual controversy must exist for declaratory relief to be appropriate. *South Whitehall Township v. Department of Transportation,* 82 Pa. Commonwealth Ct. 217, 475 A.2d 166 (1984).

Summary judgment may be entered only where the following standards are met:

> 1) the case must be clear and free from doubt; 2) the moving party must prove that there is no genuine issue of material fact to be tried and that it is entitled to judgment as a matter of law; and 3) the record must be viewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

[1] PIPP is a non-profit organization whose membership consists primarily of small, independent oil producers who operate at a low level of capacity.

[2] Act of December 19, 1984, P.L. 1140, 58 P.S. §§601.101—601.605.

Pennsylvania Public Utility Commission Bar Association v. Thornburgh, 62 Pa. Commonwealth Ct. 88, 93, 434 A.2d 1327, 1329 (1981), *aff'd*, 498 Pa. 589, 450 A.2d 613 (1982). A motion for summary judgment is appropriate in declaratory judgment proceedings. *Id.*

The Oil and Gas Act became effective on April 18, 1985. It replaced the Gas Operations Well-Drilling Petroleum and Coal Mining Act.[3] The purpose of the Oil and Gas Act is to permit the optimal development of [76] such resources in this Commonwealth consistent with the protection of the health, safety, environment and property of the citizenry.[4] At the time this case was argued before this Court, no enforcement actions had been initiated.

PIPP's petition to this Court contains thirteen counts challenging seven specific provisions of the Oil and Gas Act and, in the alternative, the entire Act itself. We will review the contested provisions *seriatim*.

Section 208

Water Pollution Presumption

Section 208(c)[5] creates a rebuttable presumption that a well operator is responsible for pollution of any water supply within 1,000 feet of a gas or oil well. Section 505(a)[6] states that a person who violates any provision of the Act is guilty of a summary offense, punishable by a fine not to exceed $300 and/or imprisonment up to ninety days. Willful violators of the Act are guilty of a misdemeanor with possible imprisonment of not more than one year. Section 505(b).[7]

[3] Act of November 30, 1955, P.L. 756, *as amended, formerly* 52 P.S. §§2101—2602, repealed by Section 606(a) of the Act of December 19, 1984, P.L. 1140.

[4] Section 102 of the Oil and Gas Act, 58 P.S. §601.102.

[5] 58 P.S. §601.208(c).

[6] 58 P.S. §601.505(a).

[7] 58 P.S. §601.505(b).

PIPP contends that if the pollution presumption is applied in a criminal enforcement proceeding, it would impermissibly shift to a well operator the Commonwealth's burden to prove beyond a reasonable doubt all elements of a criminal violation. *See Commonwealth v. McFarland*, 252 Pa. Superior Ct. 523, 382 A.2d 465 (1977).

The Commonwealth counters that declaratory relief is inappropriate at this time because no criminal actions involving Section 208 have been initiated. Hence, no [77] actual controversy or threatened action exists. *See Chester Upland School District v. Commonwealth*, 90 Pa. Commonwealth Ct. 464, 495 A.2d 981 (1985). The Commonwealth also argues that Section 208 creates only a rebuttable presumption to a *civil* offense because the penalty imposed for pollution in subsection (a), *i.e.*, restoration or replacement of the affected water supply, is the exclusive remedy for violations.

The criminal sanctions found in Section 505 are expressly applicable to violations of *any* provision of the Oil and Gas Act. However, the record fails to disclose any actual or threatened criminal prosecution for a Section 208 violation. The Commonwealth has conceded that the presumption would not be appropriate in criminal prosecutions and that it would have the burden to establish all elements of a criminal violation. Therefore, since we find any injury resulting from Section 506 sanctions to be speculative and remote, we decline to declare Section 208 unconstitutional.

Section 215

Bond Requirements

Section 215(a)[8] requires that as of the effective date of the Oil and Gas Act, a bond be filed with the Department of Environmental Resources (DER) upon the filing of an application for a well permit or before continued operation of any oil or gas well. The bonding amount per well is $2,500.[9] However, in lieu of individual bonds, an owner may post a blanket bond of $25,000. The bond is required to ensure compliance with all requirements of the Oil and Gas Act. The [78] amount reflects the costs which the Commonwealth would incur to plug an abandoned or illegally operated well.

PIPP contends that this section creates two separate classes—large well operators, *i.e.*, owners of ten or more wells posting a blanket bond, and small well operators—and that it discriminates against the small operators, hence violating the Equal Protection Clause of the Fourteenth Amendment and Article I, §1 of the Pennsylvania Constitution.

Since there exists no allegations of a violation of "suspect" classifications or "fundamental" rights, in order for the legislative classification found in Section 215 to be upheld, it must be found to be reasonable, not arbitrary, and rest upon a difference having a fair and substantial relation to the object of the legislation. *Snider v. Thornburgh*, 496 Pa. 159, 436 A.2d 593 (1981).

We hold that Section 215 does not violate the equal protection clause. PIPP advances its argument by creating a hypothetical conglomerate entity which posts

[8] 58 P.S. §601.215(a).

[9] The Environmental Quality Board has the authority to adjust the bonding amount every two years to reflect the projected costs to the Commonwealth of performing well-plugging.

a blanket bond covering 1,000 wells, hence posting $25 bond per well. PIPP argues that this classification enhances the survival of larger oil corporations because smaller well operators are financially disadvantaged.[10]

The legislature, in creating the blanket amount, acted reasonably and in a non-discriminatory manner. As a safeguard to small operators, it enacted Section 215(d), which permits economically distressed operators to submit nonrefundable fees in the amount of $50 in place of $2,500 bonds. Moreover, Section 215(c)[11] states that the entire blanket bond may be forfeited for a violation at a single well site and that the entire bond would [79] have to be replaced within ten days. Such a sanction would injure large operators to the benefit of small operators. We conclude that the blanket bond provision treats all operators fairly and is consistent with the Act's avowed purposes.

Sections 210(e) and 215(c), (e)

Prehearing Seizure of Property and Bonds

Section 210(e)[12] authorizes DER to enter upon an unplugged and abandoned well, proceed to plug the well and sell any remaining equipment, casing and pipe to recover plugging costs. Section 215(c) permits DER to declare a bond forfeited upon noncompliance by a well operator with any provision of the Oil and Gas Act.

PIPP contends that by permitting both actions without any prior notice or hearing, these sections deprive well operators of due process of law, in violation

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[10] There is record evidence that some companies do operate over 1,000 wells in this Commonwealth.

[11] 58 P.S. §601.215(c).

[12] 58 P.S. §601.210(c).

of the Commonwealth and United States Constitutions. Specifically, PIPP argues, relying on *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), that no emergency or exigency exists which would permit a preforfeiture or pre-seizure hearing.

The Commonwealth counters that (1) this challenge is premature since PIPP has made no assertion that the provisions have been unconstitutionally applied and (2) Section 1921-A of The Administrative Code of 1929 (Code),[13] which permits an aggrieved party to timely appeal such action to the Environmental Hearing Board (EHB), adequately protects PIPP's due process rights.

Again, this Court is troubled because we are compelled to operate in a vacuum and to speculate as to how these statutory guidelines will be implemented and enforced. *See American Family Life Assurance Co. v.* [80] *Insurance Department,* 51 Pa. Commonwealth Ct. 247, 414 A.2d 166 (1980). We note that in its statement of policy as to how bond forfeiture would be implemented prior to the issuance of regulations by the Environmental Quality Board (EQB),[14] DER stated that such action would be utilized only after all other remedies were exhausted and that the surety and owner would receive prior notice and opportunity to comply with any violations of the Act.[15] Moreover, consistent with the definition of "abandonment" in Section 103[16] of the Act and the notice requirements of abandonment found in Section 210 of the Act, DER will attempt to plug a well only after a well owner fails to apprise DER of on-site

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[13] Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §510-21.

[14] Section 604, 58 P.S. §601.604.

[15] This statement is made part of the record pursuant to the Commonwealth's response to request for production of documents.

[16] 58 P.S. §601.103.

activity (*i.e.*, a driller only need request "inactive" status, pursuant to Sections 210(a) and 103, thereby giving notice of nonabandonment).

While this Court is concerned about potential due process violations by DER's actions, a statute's constitutionality is presumed unless there appears a clear and palpable constitutional violation. *U.S. Steel v. Workmen's Compensation Appeal Board (Mehalovich)*, 72 Pa. Commonwealth Ct. 481, 457 A.2d 155 (1983). We hold that Sections 210 and 215 do not effect a denial of due process.

Section 508

Material and Witness Production

This provision authorizes DER to make inspections, conduct tests or samplings, and/or examine books, papers and records pertinent to any ongoing investiga- [81] tion commenced under the 1984 Oil and Gas Act. Section 508(b)[17] states:

> (b) The owner, operator, or other person in charge of such property, facility, operation or activity, upon presentation of proper identification and purpose for inspection by the agents or employees of the department, shall give such agents and employees free and unrestricted entry and access and, upon refusal to grant such entry or access, the agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection. It shall be sufficient probable cause to issue a search warrant authorizing such examination and inspection if there is probable cause to believe that the object of the investigation is subject to

[17] 58 P.S. §601.508(b).

> regulation under this act and access, examination or inspection is necessary to enforce the provisions of this act.

PIPP argues that this provision permits warrantless searches, in violation of the Fourth Amendment to the United States Constitution, and that its definition of probable cause to obtain a warrant of entry is legally insufficient.

The Commonwealth disagrees with PIPP's interpretation of the provision and argues that the provision is a valid constitutional exercise of the Commonwealth's police power to enter and inspect regulated premises.

In *Commonwealth v. Lutz*, 512 Pa. 192, 516 A.2d 339 (1986), and *Commonwealth v. Fiore*, 512 Pa. 327, 516 A.2d 704 (1986), our Supreme Court recently discussed warrantless administrative searches as authorized in Section 608 of the Solid Waste Management Act.[18] In *Fiore*, warrantless searches of hazardous waste disposal sites were upheld.[19]

[82] Initially, this Court notes that the provision under review in the instant matter differs from the search provisions in *Lutz* and *Fiore*. Section 508(b) and (c) clearly recognize a well owner or operator's right to refuse entry to DER agents. In their briefs, PIPP and the Commonwealth propose hypothetical factual

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[18] Act of July 7, 1980, P.L. 380, 35 P.S. §6018.608.

[19] It should be noted that on March 24, 1987, the United States Supreme Court vacated the judgment in *Lutz* and remanded for further consideration in light of the Supreme Court's recent decision in *United States v. Dunn*, 94 L.Ed. 2d 326 (1987) (No. 85-998, filed March 3, 1987). For our purposes, we do not believe that the aspects of the analysis in *Fiore* and *Lutz*, which we rely upon herein, have been affected by the United States Supreme Court order.

situations to support their respective positions on the validity or invalidity of the warrant requirement in Section 508(b). This Court is troubled by the lack of an actual controversy to rightly examine Section 508 and therefore we decline to enter judgment. The strong presumption of the constitutionality of a statute survives unless a party meets its heavy burden of showing that the statute "clearly, palpably and plainly" violates the Constitutions. *Snider v. Thornburgh*, 496 Pa. at 167, 436 A.2d at 596. This burden has not been met.

Section 212

Well Reporting Requirements

Well operators are required, pursuant to Section 212,[20] to file reports specifying the status and production level of each well. Additional records, logs, charts and data must be filed disclosing information on well depth and formation. Submitted reports and records are kept confidential by DER for a period of one year. Upon operator request, confidentiality is extended for an additional four years, DER is permitted to use the information submitted for enforcement proceedings.

PIPP argues that the information sought is not critical to effectuating the purposes of the Act and hence its [83] members' right to privacy is invaded. Additionally, PIPP argues that Section 508 violates the well operators' Fifth Amendment rights against self-incrimination.

The Commonwealth counters that the provision adequately addresses the business operator's privacy rights and that the reports and records are not of an incriminating nature.

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[20] 58 P.S. §601.212.

We note that Section 212(b) provides that regulations be issued delineating the type of well records required to be submitted. Moreover, Section 212(c) requires DER to send notification to operators requesting specific pre-drilling information. The record reveals that neither of these two preconditions to record submissions has occurred. Therefore, in the absence of a sufficient description of well records which *must* be submitted, this Court will not adjudicate the violation of the constitutional rights PIPP claims are infringed.

Likewise, the reports containing well status and production levels, which on request can be kept confidential for a five-year period, do not, at this time, infringe upon operators' constitutional rights. Well status and production reports are essential to DER's authority and duty to police the Commonwealth's environmental resources. We decline to declare Section 212 unconstitutional.

Section 509

Unlawful Conduct

Section 509[21] states that it is unlawful for any person to drill, alter, operate or utilize an oil or gas well in violation of the rules or regulations adopted pursuant to the Act or orders issued by DER.

PIPP argues that the lack of statutory standards and/or guidelines in the Act controlling the EQB's regula- [84] tion-making power constitutes an unlawful delegation of the legislature's power to determine what actions shall be criminal.

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[21] 58 P.S. §601.509.

We hold that the standards in the Act are definite and reasonable and constitute a lawful delegation of legislative power. *Bortz Coal Co. v. Commonwealth,* 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971).

The EQB is granted the authority to adopt regulations to "implement the provisions" of the Act. Section 604.[22] The declared purpose of the Act is to protect (1) well operation personnel and facilities, (2) persons residing near well sites, (3) the Commonwealth's natural resources and (4) and permit the optimal development of oil and gas in the Commonwealth. Section 102 of the Act. We find that the provisions now found in the Act are consistent with the stated purposes and contain adequate standards to guide EQB in promulgating regulations.

It must be noted, however, that at this time we can consider only the delegation of authority, not the validity of non-promulgated regulations. We hold that Section 509 is constitutionally valid.

1984 Oil and Gas Act

Lastly, PIPP contends that the entire Act is unconstitutional because it deprives its members of due process of law by unlawfully commingling legislative, prosecutorial and judicial functions in DER.

Chapter 5 of the Oil and Gas Act, Sections 501-511, authorizes DER to enforce all of the provisions of the Act. As discussed previously, the EQB is authorized to adopt regulations to implement the provisions of the Act. Section 604. The EHB has the power and duty to [85] review any order, permit, license or decision issued by DER.

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[22] 58 P.S. §601.604.

PIPP argues that since the EQB and the EHB are placed under DER in Section 202 of the Code,[23] impermissible commingling occurs. We disagree.

Our review of the statutory composition and authority of each of the three entities reveals that no commingling of legislative, executive and judicial authority exists. *See East Pennsboro Township Authority v. Department of Environmental Resources,* 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975). The EHB, composed of three gubernatorial appointees to serve six-year terms, is an independent board administratively placed in DER, Section 472 of the Code.[24] The EQB is a twenty-one member body, Section 471 of the Code,[25] which has the authority to promulgate rules and regulations for the proper performance of DER's duties, Section 1920-A of the Code,[26] and for the conduct of hearings before the EHB, Section 1921-A of the Code.[27]

The structure and composition clearly establishes specific and separate duties for each entity. In reviewing the controlling statutory authority, we find no commingling. The legislative reorganization in Section 202 of The Administrative Code of 1929, realigning the numerous commissions, agencies and boards into the listed departments was for administrative purposes and not for an intermingling of their duties. Again, reviewing PIPP's contention on record before us, we discern no overlapping functions or violations of constitutional rights by EHB, EQB and DER.

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[23] 71 P.S. §62.

[24] 71 P.S. §180-2.

[25] 71 P.S. §180-1.

[26] 71 P.S. §510-20.

[27] 71 P.S. §510-21.

[86] *Conclusion*

The Court holds that the 1984 Oil and Gas Act is constitutional. Thus, petitioner's motion for summary judgment is denied.

Upon consideration of our reasoning in *Pennsylvania Independent Petroleum Producers v. Department of Environmental Resources,* 95 Pa. Commonwealth Ct. 51, 504 A.2d 420 (1986), and our holding in the matter *sub judice,* in the interest of judicial economy, we shall proceed further in this matter and consider whether summary judgment should be entered in favor of the respondents, the non-moving parties. *Bensalem, Township School District v. Commonwealth,* 105 Pa. Commonwealth Ct. 388, 524 A.2d 1027 (1987).

In this action, PIPP is attempting to establish that the 1984 Oil and Gas Act is constitutionally infirm. After reviewing the evidence presented and arguments advanced herein, we have decided not to declare the 1984 Oil and Gas Act or any of its provisions unconstitutional. Hence, inasmuch as petitioner cannot recover as a matter of law, we will enter judgment in favor of the respondents.

ORDER

Upon consideration of petitioner's motion for summary judgment, respondents' answer thereto, and after argument, it is ordered that the motion for summary judgment is denied. Judgment is entered in favor of respondents.

Judge BARRY concurs in the result only.

Opinion of Commonwealth Court of Pennsylvania Dated February 7, 1986, Overruling Respondents' Preliminary Objections

[51] * * *

PA. IND. PETROL. PROD. *v.* PennDER et al.

504 A.2d 420

Pennsylvania Independent Petroleum Producers, a Non-Profit Corporation, Petitioner *v.* Commonwealth of Pennsylvania, Department of Environmental Resources and Nicholas De Benedictis, Secretary of Environmental Resources of the Commonwealth of Pennsylvania, Respondents.

Argued October 9, 1985, before President Judge CRUMLISH, JR., Judges ROGERS, CRAIG, MACPHAIL, DOYLE, COLINS and PALLADINO.

[52] Statement of the Case—
Opinion of the Court.

Original jurisdiction, No. 1195 C.D. 1985 in case of Pennsylvania Independent Petroleum Producers, a Non-Profit Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources and Nicholas De Benedictis, Secretary of Environmental Resources of the Commonwealth of Pennsylvania.

Petition for review in the Commonwealth Court of Pennsylvania in nature of equitable action for declaratory judgment. Respondents filed preliminary objections. Held: Preliminary objections overruled. Commonwealth ordered to file answer within thirty days.

Thomas L. Cooper, with him, *Alfred S. Pelaez, Gilardi, Cooper & Gismondi, P.A.,* for petitioner.

Jerome T. Foerster, Deputy Attorney General, with him, *Allen C. Warshaw,* Chief Deputy Attorney General, Chief, Litigation Section, and *LeRoy S. Zimmerman,* Attorney General, for respondents.

PER CURIAM, February 7, 1986:

The Commonwealth has filed preliminary objections, in the nature of a demurrer, to a complaint for declaratory and equitable relief brought by the Pennsylvania Independent Petroleum Producers (PIPP).[1] The complaint challenges the constitutionality of the Oil and Gas Act of 1984 (Act).[2]

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[1] On September 4, 1985, this Court denied the Producers' motion for a preliminary injunction. PIPP is a non-profit organization whose membership consists primarily of small, independent oil producers who operate at a low level of capacity.

[2] Act of December 19, 1984, P.L. 1140, 58 P.S. §§601.101-601.605.

PIPP's petition for review contains thirteen counts, which allege the following:

Count 1—Section 208 of the Act violates its due process rights because it creates a presumption of liability for pollution with both criminal and civil sanctions;

Count 2—Section 215 of the Act, which establishes bonding requirements for well sites, violates its members' equal protection rights;

Count 3—Section 215(d) of the Act, which establishes a fee schedule for companies that cannot obtain bonds, violates its members' equal protection rights;

Count 4—Sections 210(e) and 215(c), which provide for pre-bearing seizures of property by DER, violates its members' due process rights;

Count 5—Section 508 of the Act, which provides for inspection of papers and drilling sites, violates its members' Fourth Amendment right against warrantless seizures;

Count 6—Section 212 of the Act, which compels operators to produce and file certain production information, invades its members' right to privacy;

(Footnote continued on following page.)

[53] The Commonwealth contends that the complaint fails to state a claim upon which relief can be granted because the Act is a valid exercise of its police power and its duty to protect the environment. It also contends that the action is not ripe, as the Act has yet to be enforced in regard to PIPP's drilling operations.

[54] We have reviewed the parties' able briefs and, after entertaining oral argument before the Court en banc, overrule the preliminary objections. The complaint presents several justiciable issues concerning the validity

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(Footnote continued from preceding page.)

Count 7—Section 509 of the Act, which defines unlawful conduct under the Act, is vague and overly broad and is a wrongful delegation of the legislative power to determine what actions shall be criminal;

Count 8—The entire Act is violative of the separation of powers provided for in the Articles of the Constitution of Pennsylvania by combining and commingling administrative, investigatory, prosecutorial and judicial functions in a single department of the Executive Branch.

Count 9—The entire Act constitutes an abuse of the state's police power;

Count 10—A March 11, 1985 letter from DER informing its members of the new law and the validity of old well permits was an unauthorized act of DER;

Count 11—The DER letter constitutes a "regulation" which was not promulgated pursuant to the Commonwealth Documents Law, Act of July 31, 1968, P.L. 764, *as amended*, 45 P.S. §1102 et seq.

Count 12—The DER letter constitutes a "taking" of property without due process of law; and

Count 13—The revocation or modification of old well permits is an invalid taking without due process of law or "just" compensation.

of certain provisions of the Act,[3] the impact of which presents sufficient direct and immediate injury for this Court to entertain jurisdiction at this time. *Arsenal Coal Co. v. Department of Environmental Resources,* 505 Pa. 198, 477 A.2d 1333 (1984).

PER CURIAM ORDER

Now, this 7th day of February, 1986, it is ordered that the Commonwealth's preliminary objections are overruled. The Commonwealth is directed to file an answer to the petition within thirty (30) days of the date of this Order.

[3] Due to the posture of the proceeding and the constitutional challenges, further proceedings are required in this Court before the merits can be adequately addressed. Specifically, the counts concerning (1) alleged violations of due process of law and equal protection, (2) the commingling of legislative, prosecutorial, administrative and judicial functions and (3) the status and/or effect of the March 11, 1985 DER letter appear to have possible merit and require further proceedings. Stipulations by the parties on factual matters are urged for a timely review of this matter.

Text of Applicable Portions of the Oil and Gas Act of 1984

§601.101. Short title

This act shall be known and may be cited as the Oil and Gas Act. 1984, Dec. 19, P.L. 1140, No. 223, §101, effective in 120 days.

§601.208. Protection of water supplies

(a) Any well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply.

(b) Any landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify the department and request that an investigation be conducted. Within ten days of such notification, the department shall investigate any such claim and shall, within 45 days following notification, make a determination. If the department finds that the pollution or diminution was caused by the drilling, alteration or operation activities or if it presumes the well operator responsible for pollution pursuant to subsection (c), then it shall issue such orders to the well operator as are necessary to assure compliance with subsection (a). Such orders may include orders requiring the temporary replacement of a water supply where it is determined that the pollution or diminution may be of limited duration.

(c) Unless rebutted by one of the five defenses established in subsection (d), it shall be presumed that a well operator is responsible for the pollution of a water

supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.

(d) In order to rebut the presumption of liability established in subsection (c), the well operator must affirmatively prove one of the following five defenses:

(1) The pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey.

(2) The landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey.

(3) The water supply is not within 1,000 feet of the well.

(4) The pollution occurred more than six months after completion of drilling or alteration activities.

(5) The pollution occurred as the result of some cause other than the drilling or alteration activity.

(e) Any operator electing to preserve is defenses under subsection (d)(1) or (2) shall retain the services of an independent certified laboratory to conduct the predrilling or prealteration survey of water supplies. A copy of the results of any such survey shall be submitted to the department and the landowner of water purveyor in a manner prescribed by the department.

(f) Nothing herein shall prevent any landowner or water purveyor who claims pollution or diminution of a water supply from seeking any other remedy that may be provided at law or in equity.

1984, Dec. 19, P.L. 1140, No. 223, §208, effective in 120 days.

§601.212. Well reporting requirements

(a) Every well operator shall file with the department, on a form provided by the department, an annual report specifying the amount of production from each well on an individual well basis. Where said data is not available on a well basis, it may be reported on the most well-specific basis available. Annual reports shall also specify the status of each well; however, in subsequent years, only changes in the status need be reported. All such reports shall be kept confidential for one year after the date the information is required to be filed hereunder. Upon request of the well operator, the department shall extend the period of confidentiality for four years. The total period of confidentiality shall not exceed five years: Provided, however, That the department shall have the right to utilize such information in enforcement proceedings, in making designations or determinations under section 1927-A of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929, or in aggregate form for statistical purposes.

(b) It shall be the duty of the well operator to keep records of any well drilled or altered. A record of the well containing such information as required by regulation shall be filed with the department within 30 days of cessation of drilling. A completion report containing such additional information as required by regulation shall be filed with the department within 30 days after the completion of the well and it shall be kept on file by the department. Within 90 days after the completion of drilling or recompletion of a well, if requested by the department, the well operator shall submit a copy of the electrical, radioactive or other standard industry logs if they have been run. In addition, if requested by the department within one year, the well operator shall file a

copy of drill stem test charts, formation water analysis, porosity, permeability or fluid saturation measurements, core analysis and lithologic log or sample description or other similar data as compiled. No such information shall be required unless the well operator has had such information compiled in the ordinary course of business. No interpretation of the date is to be filed.

(c) Upon notification by the department prior to commencement of drilling, the well operator shall collect for the department additional data as the department shall specify, such as representative drill cuttings and samples from cores taken and any other such geological information that the operator reasonably can compile. No interpretation of the data is to be filed.

(d) All electrical, radioactive or other standard industry logs, drill stem test charts, formation water analyses, porosity, permeability or fluid saturation measurements, core analysis and lithologic logs or sample description or other similar data as compiled, required under subsection (b) or drill cuttings required under subsection (c) shall be retained by the well operator and shall be filed with the department three years after completion of the well. Upon request of the well operator, the department shall extend the date for the filing of the data, but the extension shall not exceed five years from the date of completion of the well: Provided, however, That the department shall have the right to utilize such information in enforcement proceedings, in making designations or determinations under section 1927-A of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929, or in aggregate form for statistical purposes.

1984, Dec. 19, P.L. 1140, No. 223, §212, effective in 120 days.

§601.505. Penalties

(a) Any person who violates any provisions of the act is guilty of a summary offense and, upon conviction thereof, shall be sentenced to pay a fine of not more than $300 or undergo imprisonment of not more than 90 days, or both. Each day's continuance of such violation shall be a separate and distinct offense.

(b) Any person who willfully violates any provisions of this act or any order of the department issued pursuant to the provisions of this act is guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not more than $5,000 or undergo imprisonment of not more than one year, or both. Each day's continuance of such violation shall be a separate distinct offense.

(c) The department shall have the authority to institute prosecutions against any person or municipality under this act.

1984, Dec. 19, P.L. 1140, No. 223, §505, effective in 120 days.

§601.508. Production of materials; witnesses; depositions; rights of entry

(a) The department is authorized to make such inspections, conduct such tests or sampling or examine books, papers and records pertinent to any matter under investigation pursuant to this act as it deems necessary to determine compliance with this act and, for this purpose, the duly authorized agents and employees of the department are authorized at all reasonable times to enter and examine any property, facility, operation or activity.

(b) The owner, operator or other person in charge of such property, facility, operation or activity, upon presentation of proper identification and purpose for

inspection by the agents or employees of the department, shall give such agents and employees free and unrestricted entry and access and, upon refusal to grant such entry or access, the agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection. It shall be sufficient probable cause to issue a search warrant authorizing such examination and inspection if there is probable cause to believe that the object of the investigation is subject to regulation under this act and access, examination or inspection is necessary to enforce the provisions of this act.

(c) The department shall have the power in any part of the Commonwealth to subpoena witnesses, to administer oaths, examine witnesses or to take such testimony or compel the production of such books, records, maps, plats, papers, documents and other writings as it may deem necessary or proper in and pertinent to any proceedings or investigation held or had by it. In case of refusal to obey any subpoena served upon any person, any court shall, on application of the department, have power to enforce such subpoenas in contempt proceedings. The fees for serving a subpoena shall be the same as those paid sheriffs for similar services.

(d) The department or any party to proceedings before the department may cause the deposition of witnesses, residing within or without the Commonwealth, to be taken in the manner prescribed by law for taking depositions in civil actions.

(e) Witnesses who are summoned before the department shall be paid the same fees as are paid to witnesses in the courts of record of general jurisdiction. Witnesses whose depositions are taken pursuant to the

provisions of this act and the officers taking the same shall be entitled to the same fees as are paid for like services in such courts.

1984, Dec. 19, P.L. 1140, No. 223, §508, effective in 120 days.

§601.509. Unlawful conduct

It shall be unlawful for any person to:

(1) Drill, alter, operate or utilize an oil or gas well without a permit or registration from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.

(2) Conduct any activities related to drilling for, or production of, oil and gas, contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety, welfare or the environment.

(3) Refuse, obstruct, delay or threaten any agent or employee of the department in the course of performance of any duty under this act, including, but not limited to, entry and inspection under any circumstances.

(4) Attempt to obtain a permit by misrepresentation or failure to disclose all relevant facts.

1984, Dec. 19, P.L. 1140, No. 223, §509, effective in 120 days.

No. 88-1280 (2)

Supreme Court, U.S.
FILED
MAR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS,
a non-profit corporation,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, and NICHOLAS DeBENEDICTIS, Secretary of Department of Environmental Resources of the Commonwealth of Pennsylvania,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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February 28, 1989

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STATEMENT OF THE CASE

Petitioner's action was commenced in the Commonwealth Court of Pennsylvania and sought a declaratory judgment that Pennsylvania's Oil and Gas Act, Act of Dec. 19, 1984, P.L. 1140, as amended, 58 P.S. §§ 601.101 - 6101.605, was unconstitutional. Commonwealth Court entered summary judgment in the respondents' favor on May 11, 1987, holding that the Act was Constitutional. The Pennsylvania Supreme Court affirmed in a per curiam Order dated November 14, 1988, with one Justice dissenting (without opinion).

Prior to the passage of the act in question, the industry was governed by the Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of Nov. 30, 1955, P.L. 756, No. 225, as

amended, 52 P.S. § 2101 et seq. (repealed). Thus, the oil and gas industry in Pennsylvania has been pervasively regulated for many years.

Petitioner originally challenged seven specific provisions of the Oil and Gas Act and the entire Act as well. Commonwealth Court held that Petitioner's challenges, for the most part, were premature because of the lack of an actual case or controversy.[1]

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[1]Petitioner's challenges to Section 215, bond requirements, to the legislative delegation of rule making powers under Section 509 and its challenge to the entire Act on the grounds of unlawful commingling were decided on the merits.

Petitioner now challenges only Section 208 (water pollution presumption), Section 508 (material and witness production and administrative searches) and Section 212 (records required to be maintained and reports required to filed).

Section 208 provides for a rebuttable civil presumption that a well operator is responsible for pollution of a water supply that is within 1000 feet of an oil and gas well occurring within six months after the completion of drilling or alteration of the well.

Section 508 provides for warrantless administrative inspections of commercial premises, not homes, and records and provides further that upon refusal of the operator to grant access, the Department's agent or employee may

obtain a search warrant or other suitable order authorizing entry and inspection.

Section 212 requires the making, maintaining and filing with the Department records and reports on well production, completion and cessation, drill cuttings and other geological information, and a variety of other technical matters.

ARGUMENT

The Pennsylvania Supreme Court's Decision Affirming the Grant of Summary Judgment for the Respondent Presents Neither the Existance of a True and Significant Conflict Worthy of this Court's Review nor any Special or Important Reasons for It.

1. SECTION 208's PRESUMPTION OF POLLUTION IS USED BY THE DEPARTMENT ONLY TO DETERMINE WHETHER TO ISSUE AN ADMINISTRATIVE ORDER. NEITHER SECTION 208 NOR THE ACT IN TOTO SHIFTS THE BURDEN OF PROOF IN CRIMINAL PROCEEDINGS.

The mere fact that the Act includes criminal sanctions for its violation does not, whatever Petitioner may say, convert it into a penal statute. New York v. Burger, 482 U.S. ____, 107 S.Ct. 2636, 96 L.Ed. 2d 601 (1987); Masland v. Bachman, 473 Pa. 280, 374 A.2d 517 (1977); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974). In Burger this Court held that "an administrative

statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed." 107 S.Ct. at 2649, 96 L.Ed. 2d at 620. The statute in Burger, like the Oil and Gas Act, provided that certain administrative violations constituted a misdemeanor, 107 S.Ct. at 2651, n. 25, 96 L.Ed. 2d at 622, n. 25, but this Court rejected the idea that it thereby became a penal statute. It noted that "a state can address a major social problem both by way of an administrative scheme and through penal sanctions." Id. Thus, the inclusion of civil and criminal sanctions, as necessary means to assure enforcement of the Act, does not change

the basic regulatory objectives and nature of the Oil and Gas Act nor require that its provisions be judged by any stricter standards which might apply to criminal enactments.

Petitioner maintains that the rebuttable presumption contained in Section 208 of the Act, 58 P.S. § 601.208, will allow unconstitutional criminal prosecutions. Section 208 provides that any well operator who affects a public or private water supply shall restore or replace the affected supply. It further provides, in subsection (c), that:

> (c) Unless rebutted by one of the five defenses established in subsection (d), it shall be presumed that a well operator is responsible for the pollution of a water supply

> that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.

If the Department, by using this presumption, determines that the well operator is responsible for pollution or water loss, then it may issue orders to the well operator to restore or replace the water supply.[2] Section 208(b).

The operator may appeal such an order to the state Environmental Hearing

---

[2]The presumption may be rebutted by a showing that (1) the pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey or (2) the landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey or (3) the water supply is not within 1,000 feet of the well or (4) the pollution occurred more than six months after completion of drilling or alteration activities or (5) the pollution occurred as the result of some cause other than the drilling or alteration activity. Section 208(d).

Board (EHB), which may grant a supersedeas. The Administrative Code, Act of April 9, 1929, P.L. 177, Art. XIX-A, § 1921-A(c) and (d) added by Act of Dec. 3, 1970, P.L. 834, No. 275, 71 P.S. § 510-21.

Section 208 clearly sets forth a civil remedy. The presumption is used by the Department to order replacement or restoration of a water supply. The operator can contest that presumption by raising any one of five defenses that rebut the civil presumption, and can raise these defenses to the Department or in an appeal before the EHB.

Nothing in Section 208 purports to change existing principles of criminal law; it only establishes a rebuttable presumption used in determining whether the Department should order a well operator to restore a water supply. Nothing in Section 208 purports to shift

the burden of proof in a criminal proceeding; the Department must still prove any alleged criminal conduct in accordance with principles of criminal law, whenever it institutes criminal proceedings. Also, the Department has constistently acknowledged this. Appendix p. 8a. Petitioner has simply misconstrued the effect of Section 208.

Even more importantly, Petitioner has failed to allege any instance in which the Department has instituted a criminal proceeding against anyone based upon Section 208 of the Act. There is no assertion that anyone is faced with criminal prosecution in which the burden of proof has been shifted. Petitioner does not have a justiciable interest in this matter, since its interest is not direct or substantial, but instead is

speculative and remote. See Apartment Owners and Managers Committee v. Brown, 487 Pa. 548, 410 A.2d 747 (1980)(holding that no actual case or controversy was presented even where District Attorney publicly announced that he would criminally prosecute for certain conduct).

The cases Petitioner cites in its Petition are inapposite. In re Winship, 397 U.S. 358 (1970) involved an actual attempt to adjudicate a child as delinquent. Sandstrom v. Montana, 442 U.S. 510 (1978), involved an actual criminal prosecution. Here there are no actual or threatened prosecutions, only Petitioner's unsupported speculation.

The constitutionality of this statute should be evaluated in the context of its actual application to a concrete situation. See Commonwealth v.

Maxwell, 505 Pa. 152, 477 A.2d 1309, 1318 (1984), cert. denied, Maxwell v. Pennsylvania, 105 S.Ct. 370 (1984) reh'g. denied, 105 S.Ct. 3516 (1985). The Pennsylvania courts, therefore, properly rejected Petitioner's challenge as premature.

2. SECTION 508 IS A CONSTITUTIONAL AUTHORIZATION OF WARRANTLESS ADMINISTRATIVE INSPECTIONS OF REGULATED PREMISES, NOT HOMES, IN AN INDUSTRY SO PERVASIVELY REGULATED THAT THE OWNERS AND OPERATORS CANNOT HAVE ANY EXPECTATION OF PRIVACY.

Petitioner also challenges the constitutionality of Section 508 of the Oil and Gas Act, 58 P.S. § 601.508, which provides for warrantless administrative inspections. This challenge is premature and, also, Section 508 is constitutionally sound.

A. It is Premature to Adjudicate the Constitutionality of Section 508 Absent any Allegation that it has been Applied in an Unconstitutional Manner.

Petitioner has not alleged that the Department of Environmental Resources has sought to gain access to any person's premises or records without his consent.

It is not appropriate to evaluate the constitutionality of the inspection provisions in a factual vacuum.

In evaluating administrative inspection laws, courts consider the cause upon which a warrant was issued, the scope of the warrant and inspection, the impact of the inspection, whether the person subject to the inspection is licensed, the grounds to be inspected, the existence of regulations implementing the statute, and the individual circumstances of an actual or attempted entry. See e.g. New York v. Burger, supra; Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Each of these factors has a significant bearing

on the constitutional issue, and none can be determined in the abstract.

In Younger v. Harris, 401 U.S. 37 (1971), this Court noted that there are serious problems in invalidating a provision before the state has the opportunity to apply it, or to propose regulations that define it:

> [T]he States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings.

Younger, 401 U.S. at 51. This principle, applied to the right of free speech, also should be applied to this situation where Fourth Amendment concerns have been speculatively raised.

B. Section 508's Authorization of a Warrantless Administrative Inspection of Commercial Premises and Records is Constitutionally Permissible.

In the alternative, the Department submits that Section 508 is constitutional. This Court has recently made it clear that warrantless administrative inspections of commercial premises, pursuant to a state regulatory scheme, do not offend against the Fourth Amendment. New York v. Burger, supra.

In Burger this Court held that the owner or operator of commericial premises in a "closely regulated" industry has a reduced expectation of privacy, and that the "warrant and probable cause requirements, which fulfill the traditional Fourth Amendment

standard of reasonableness for a government search, have lessened application in this context". Id., 107 S.Ct. at 2643, 96 L.Ed.2d at 613.

Burger, requires that the industry be closely regulated, that there be a substantial governmental interest in the regulatory scheme, that warrantless inspections are necessary to further the regulatory scheme and that the statute's inspection program must provide a constitutionally adequate substitute for a search warrant. Burger, 107 S.Ct. at 2644. The Oil and Gas Act easily complies with this.

Here, the oil and gas industry is closely regulated, even more closely regulated than junkyards. There is also a very substantial governmental interest in the regulatory scheme embodied in the Oil and Gas Act. For example, sections

207, 214, 208 and 209 of the Act deal with the prevention of pollution of groundwater by drilling, the coordination of coal mining activities in the vicinity of wells, the prevention of migration of oil and gas into water-bearing strata or mines, the prevention of blowouts, explosions and fires, and the protection of public and private water supplies. It is also the case that warrantless inspections are necessary to further the regulatory scheme. It is easy to conceal the evidence of improper, unlawful practices and unannounced inspections are essential "if inspection is to be effective and serve as a credible deterrent." Burger, 107 S.Ct. at 2648; Donovan v. Dewey, 452 U.S. at 603.

The Act and the Department's inspection policy,[3] published at 17 Pa. Bulletin 3235 (Aug. 1, 1987)(copy attached hereto as Appendix A), provide a constitutionally adequate substitute for a search warrant. The statute is "sufficiently comprehensive and defined" that the operator" cannot help but be aware that his property will be subject to periodic inspection undertaken for specific purposes" and, the statute "limit[s] the discretion of the inspecting officers." Burger, 107 S.Ct at 2644.[4]

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[3]A Court can take judicial notice of a publication in the Pa. Bulletin. 42 Pa. C.S. § 506. The Court may also consider the Department's policy in evaluating the constitutionality of the statute. United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983).

[4]Furthermore, the Department's published inspection policy, Appendix A

(FOOTNOTE CONTIUNED ON NEXT PAGE)

The administrative search provision of the Oil and Gas Act, § 508, is constitutional.

(FOOTNOTE CONTINUED)

hereto, further defines the frequency and circumstances under which an operator can expect an inspection. For instance, the policy provides for inspection once prior to the grant of inactive status, once during each of the phases of siting, drilling, casing or completing a well, once a year while on-site waste water brine disposal is conducted, and twice a year if a well is located in a gas storage reservoir protective area. The existence of this policy alone distinguishes this case from Commonwealth v. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), vacated and remanded, 107 S.Ct. 1560 (1987), upon which Petitioner mistakenly relies.

3. SECTION 212 DOES NOT VIOLATE THE FIFTH AMENDMENT BECAUSE THE REQUIRED REPORTS ARE NOT INCRIMINATORY BY NATURE AND BECAUSE STATES MAY REQUIRE PERSONS ENGAGED IN LAWFUL ACTIVITIES TO MAKE, MAINTAIN AND FILE THE REPORTS REQUIRED TO ENFORCE THE LAW.

Section 212 of the Act, 58 P.S. § 601.212, requires well operators to file reports on well production, completion and cessation; drill cuttings and other geological information; and a variety of other technical matters, if compiled in the ordinary course of business. The Department must keep this information confidential for one year, or five years if the operator requests it, but may of course use this information in enforcement proceedings. Section 212(a). Petitioner argues that these requirements violate the Fifth Amendment right against self-incrimination.

Once again Petitioner's claim is entirely theoretical, speculative and abstract. No criminal proceedings are pending, no reports have been sought for use in such proceedings, and no individual has invoked the privilege. Again, the Court should decline to decide constitutional questions in the abstract.

In any event, Petitioner's argument is very nearly frivolous. Regulatory reporting requirements have been repeatedly upheld against self-incrimination challenges. In California v. Byers, 402 U.S. 424 (1971), this Court upheld a statute requiring a "driver of a motor vehicle involved in an accident to stop at the scene and give his name and address." 402 U.S. at 425. This Court stated:

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; ... industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution--often a very real one--for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

Byers, 402 U.S. at 427-428. Accord Shapiro v. United States, 335 U.S. 1 (1948) (records required to be kept by statute not covered by privilege against self-incrimination); Wilson v. United States, 221 U.S. 361 (1911)(same).

The cases Petitioner relies on are inapposite. Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968) both involved attempts by the government to extract admissions of gambling, an endeavor which the Court found to be fundamentally a matter of criminal rather than regulatory enforcement. Boyd v. United States, 116 U.S. 616 (1885) and United States v. Doe, 465 U.S. 605 (1984), both involved private records not required to be kept by statute.

There is no question that the state has a legitimate objective in requiring the reports described in Section 212. It is important for environmental and safety concerns to know whether wells have been completed,

where they are, and whether they are producing. To take only one example, coal mining and oil and gas drilling often take place in the same area. As miners approach gas and oil wells, it is important to know whether gas is present that could be ignited and cause catastrophe to the workers in the mines and at the well sites. The reporting requirements are constitutional, and they present no issue to justify review by this Court.

CONCLUSION

Petitioner has failed to demonstrate the existence of a true and significant conflict worthy of this Court's review as required by Supreme Court Rule 17. There being no special or important reasons therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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TITLE 25. ENVIRONMENTAL RESOURCES

PART I. DEPARTMENT OF ENVIRONMENTAL RESOURCES

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 78. INSPECTION POLICY REGARDING OIL AND GAS ACTIVITIES-STATEMENT OF POLICY

Sec.

78.1 Definitions.
78.2 Policy.
78.3 Frequency of inspections.
78.4 Manner of inspection.
78.5 Additional inspections.
78.6 Limitation.

§ 78.1 Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Department--The Department of Environmental Resources of the Commonwealth.

NGPA--Natural Gas Policy Act of 1978 (15 U.S.C.A. §§ 3301-3432 and 42 U.S.C.A. § 7255).

§ 78.2. Policy.

(a) This chapter sets forth the policy of the Department in regard to inspections of oil and gas well locations, sites, property, facilities, operations or activities governed by the Oil and Gas Act (58 P.S. §§ 601.101-601.605), the Coal and Gas Resource Coordination Act (58 P.S. §§ 501-518) or the Oil and Gas Conservation Law (58 P.S. §§ 401-419). This policy does not create a duty or obligation upon the Department to conduct a minimum or maximum number of inspections per year or during a certain period of time.

(b) Inspections are conducted to administer, implement, enforce and determine compliance with the statutes

set forth in subsection (a) and with Article XIX-A of The Administrative Code of 1929 (71 P.S. §§ 510-1--510-108), The Clean Streams Law (35 P.S. §§ 691.1-691.1001) and the Solid Waste Management Act (35 P.S. §§ 6018.101-6018.1003) and other statutes administered by the Department that apply to activities associated with gas and oil operations.

§ 78.3. Frequency of inspections.

The Department, its employes and agents intend to conduct inspections at the following frequencies:

(1) At least once prior to the issuance of a permit, if a waiver or exceptions is requested by the permit applicant.

(2) At least once in verifying or resolving objections or determining the Department's response to objections,

when objections are raised to a permit application.

(3) At least once during each of the phases of siting, drilling, casing, cementing, completing, altering and stimulating a well.

(4) At least once during, or within 3 months after, the time period in which the owner or operator is required to restore the site, after drilling the well.

(5) At least once prior to the authorization to use an alternate method for plugging, casing or equipping the well.

(6) At least once during the periods that an alternative method for plugging, casing or equipping the well is being used or installed.

(7) At least once when a well is being reconditioned or repaired or when casing is being replaced.

(8) At least once prior to a well being granted inactive status.

(9) At least once during the plugging of the well.

(10) At least once during, or within 3 months after, the period in which the owner or operator is required to restore the site, after the well is plugged or abandoned.

(11) At least once before the bond or other financial security is released.

(12) At least once a year, if there is onsite brine disposal or residual waste disposal subject to the statutes referenced in § 78.2 (relating to policy).

(13) At least twice a year if the well is located in a gas storage reservoir or in a gas storage reservoir protective area.

(14) At least once a year to determine whether compliance with the statutes administered by the Department has been achieved.

(15) If there is a violation, at least once to determine whether the violation has been corrected, or whether there is a continuing violation.

(16) At least once, in response to a complaint.

(17) At least once prior to the issuance of an NGPA determination.

§ 78.4. Manner of inspection.

The inspections described in this chapter may be conducted separately, or in combination, whichever manner is deemed by the Department to permit maximum efficiency, accuracy and thoroughness in implementing the statutes administered by the Department.

§ 78.5. Additional inspections.

The Department, its employes and agents may conduct additional inspections, including follow-up inspections, inspections to observe a practice or condition related to the public health or safety and inspections to determine compliance with the statutes set forth in § 78.2 (relating to policy), with the laws administered by the Department, with the Department's regulations, with the terms or conditions of a permit or with the requirements of an order.

§ 78.6. Limitation.

The provisions of this chapter are subject to the availability of personnel and financial resources. This chapter does not create a duty or obligation upon the Department to conduct a

minimum or maximum number of inspections per year or during a certain period.

(Pa.B. Doc. No. 87-1213. Filed July 31, 1987, 9:00 a.m.)